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Volume 62 | Issue 1

Article 4

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5-13-2017

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### Recommended Citation

Gerald Dickinson, *Inclusionary Takings Legislation*, 62 Vill. L. Rev. 135 (2017).

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2017]

## INCLUSIONARY TAKINGS LEGISLATION

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## I. INTRODUCTION

EMINENT domain takings for economic development and blight removal frequently threaten to raze low-cost housing and displace the poor and low-income communities from certain areas in a locality while excluding them from others.<sup>1</sup> Some scholars have proposed judicial imposition by way of new doctrine, such as exclusionary eminent domain doctrine, to alleviate this problem.<sup>2</sup> Other scholars have opted for an organic voluntary “land assembly process,” such as inclusionary eminent domain, which posits “multiple tools to help guide municipalities, private developers, and [low-income] communities construct or preserve affordable housing within economic redevelopment projects” born from eminent domain takings.<sup>3</sup> However, absent from the conceptual equation of these proposals is a legislative remedy. Indeed, the enactment of “inclusionary takings legislation” would strengthen the prescriptive value of these organic and doctrinal solutions. Such a proposal responds to the problems posed by post-*Kelo v. City of New London*<sup>4</sup> state-reform efforts that bar or restrict eminent domain takings for economic development, yet left loop-

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1. See *Kelo v. City of New London*, 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting); Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447, 2449–50 (2009); David Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365 (2007); Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 861 (2006); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 254 n.373 (2007); Ilya Somin, *Is Post-Kelo Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931, 1936 (2007); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2151 n.251 (2009) (citing Somin, *supra*, at 254 n.373).

2. See David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 8 (2009) (introducing “exclusionary eminent domain” as phenomenon that “displace[s] residents [who] are unable to afford new housing in the same neighborhood or locality as their now-condemned, former homes,” and thus excludes families from both their homes *and* their home neighborhood, and proposing exclusionary eminent domain doctrine by “heightened [judicial] review” of takings that cause loss of affordable housing).

3. See Gerald S. Dickinson, *Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845, 846–47 (2014) (introducing concept of “inclusionary eminent domain”).

4. 545 U.S. 469 (2005).

holes for blight removal condemnations that invariably target poor neighborhoods in localities.

This Article focuses on state legislatures because they are primary institutional players that may be best equipped to reframe the takings power for the general welfare of low-income communities affected by condemnation. Justice Stevens's opinion in *Kelo* provides such a blueprint. He noted that the ruling did not "preclude[ ] any State from placing further restrictions on its exercise of the takings power" and that eminent domain statutes could limit the grounds upon which takings may be exercised.<sup>5</sup> Indeed, in the post-*Kelo* era, state legislatures—as opposed to Congress or local municipalities—were at the forefront of eminent domain reform. Following that decision, the nation witnessed one of its most expansive reforms of the public use vein of the Fifth Amendment Takings Clause. Within several years, forty-two state legislatures "have enacted post-*Kelo* reform laws" to "either ban . . . or significantly restrict" the exercise of eminent domain in some capacity.<sup>6</sup>

The amendments, however, were mostly cosmetic solutions because a variety of blight removal exceptions remained intact in many jurisdictions, effectively allowing municipalities to continue exercising takings for economic development under the veil of blight removal and thereby achieving broader development goals.<sup>7</sup> Indeed, creating affordable housing for the poor and alleviating displacement were never high on the priority list for advocates against the expansion of economic development as a public use. State legislatures, in amending eminent domain codes, likewise missed an opportunity to bring affordable housing to the forefront of the legislative debate on the abuse of eminent domain. As Matthew Parlow notes, the *Kelo* decision did nothing to "stem the tide of affordable housing casualties of eminent domain . . . . [M]any states have responded to *Kelo* [sic] by introducing blight-only legislation that will ultimately reduce the availability of affordable housing."<sup>8</sup>

Thus, this Article proposes an alternative post-*Kelo* legislative reform effort called "inclusionary takings." Like inclusionary zoning legislation, inclusionary takings legislation would trigger remedial affordable housing action to mitigate the phenomenon of exclusionary condemnations in dense urban areas and declining suburban localities. An inclusionary takings statute would also mandate that local municipalities and private developers provide affordable housing in new developments benefiting from eminent domain takings. Such a statute may ameliorate the phenomenon of exclusionary condemnations in dense urban areas that displaces low-

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5. See *id.* at 489.

6. See Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, *supra* note 1, at 2105, 2120. Since Somin's article, the number of states has increased from thirty-six to forty-two.

7. See *id.* at 2120.

8. See Parlow, *supra* note 1, at 860 (citing statutes from Alabama, California, Massachusetts, New York, Tennessee, Texas, and Wisconsin as examples).

income families from urban neighborhoods.<sup>9</sup> An inclusionary taking, like inclusionary zoning, in other words, requires affordable housing contributions from developers as a means of dealing with perennial problems associated with housing shortages in urban and suburban localities.<sup>10</sup>

This Article demonstrates how legislatively-mandated affordable housing requirements, such as evidence of an affordable housing plan, during condemnation proceedings may offer a more robust legal mechanism under the law for triggering affordable housing development in economic development projects, while simultaneously facilitating a collaborative and inclusive process of land assembly between the developer, community, and municipality.

Part II discusses the history and purpose behind the enactment of inclusionary zoning laws, including the first of its kind in Virginia and the famous Mount Laurel saga in New Jersey. These examples served as the impetus for other states, such as California, to exercise police power to spur affordable housing construction in both suburban and urban localities in an effort to mitigate the exclusionary effects of zoning. Part II also discusses how inclusionary zoning laws have been subject to and, for the most part survived, regulatory takings and exactions challenges.

Part III posits that states' police power to exercise eminent domain is similarly positioned to achieve inclusionary housing results. Here, the Article draws parallels between the exclusionary effects of zoning and eminent domain, concluding that state legislatures should amend existing or enact new eminent domain statutes by placing conditions on the exercise of eminent domain, such as affordable housing requirements, in order for municipalities and developers to bypass post-*Kelo* restrictions on economic development and mitigate the impact of blight removal exceptions on poor and minority neighborhoods. Part IV assesses the constitutionality of inclusionary takings by discussing regulatory and exaction obstacles that state legislatures and local municipalities may face in enacting such laws.

## II. INCLUSIONARY ZONING LEGISLATION

Robert Ellickson's well-received "irony of inclusionary zoning" scholarship sparked a debate that, even today, adequately summarizes the debates between proponents and opponents regarding the usefulness of land use devices to cure socio-economic and racial segregation and produce affordable housing.<sup>11</sup> Do land use devices that serve to better the living conditions of the poor invariably help or harm the very people the policies seek to benefit, and is it within the domain of the market, the state, or the courts to help cure those problems?

9. See Dana, *supra* note 2, at 7–8.

10. See *id.* at 7–11 (discussing need for municipalities to require available affordable housing).

11. See generally Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981).

The Post-War Era housing market drove local municipalities to capture the tax revenue advantages of exclusionary zoning by placing restrictions on the minimum floor area or lot size for residential structures, which inflated the value of the property and effectively excluded the poor and, by extension, racial minorities from the suburbs.<sup>12</sup> These land use regulations were manipulated partially in response to what some call social and economic zoning. While racial zoning had been struck down, exclusionary zoning was far less explicit in its motives.<sup>13</sup> But exclusionary zoning did, nonetheless, achieve the same exclusionary results as explicit racial zoning.<sup>14</sup> The poor, in response to increasing segregation and concentrated poverty, sought to combat the exclusionary phenomenon of zoning through litigation that led to inclusionary zoning legislation.<sup>15</sup>

Inclusionary zoning laws were conceived in an attempt to quell the exclusionary nature of zoning and alleviate affordable housing shortages through several voluntary and mandatory zoning devices, such as density bonuses, set-aside schemes, in-lieu fees, linkage fees, fee waivers, and fast-track permitting.<sup>16</sup> The ordinances were justified by legislatures as essential to the public welfare because municipalities were already obligated, under the police power, to ensure the health, safety, and welfare of their residents. This obligation included utilizing the scarce commodity of land by regulating the land to encourage the construction of low-cost housing. Indeed, an exodus of middle and working-class populations from the urban core left behind an “underclass” of Americans who lacked access to safe and adequate affordable housing, as well as jobs, because much of these commodities and opportunities had moved to the suburbs.<sup>17</sup> As a result, municipalities, facing housing shortages for the poor, particularly in the suburbs, were compelled to take action to ameliorate this problem when it became apparent through intense impact litigation that the poor

12. See Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780–85 (1969).

13. See *Buchanan v. Warley*, 245 U.S. 60, 76–77 (1917) (noting Fourteenth Amendment “speaks in general terms” and that “[a]ny state action that denies this immunity to a colored man is in conflict with the Constitution”). The ordinance at issue in *Buchanan* sought to make “reasonable provisions requiring . . . the use of separate blocks, for residences, places of abode . . . by white and colored people respectively.” See *id.* at 70.

14. See *id.* at 80 (noting effect of discriminatory ordinance “was to destroy the right of the individual to acquire, enjoy, and dispose of his property”); see also Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 197 (2003) (discussing effects of housing discrimination).

15. See ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 224–25 (2d ed. 2010); see also generally Harold A. McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm*, 14 HARV. C.R.-C.L. L. REV. 625 (1979) (examining New Jersey Supreme Court’s reaction to exclusionary zoning).

16. See Dickinson, *supra* note 3, at 873–81 (discussing “tools of inclusionary zoning”).

17. See generally WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987) (analyzing effects of exodus of working class families from inner city and causes of social dislocation).

were indeed being left behind in deteriorating, slum-like urban areas while simultaneously being excluded from desirable localities in the suburbs.<sup>18</sup>

The inflation of land costs, along with low-density criteria and costs associated with land use approvals, subdivision fees, and other exactions made it arguably fiscally impossible for developers to construct low-cost housing for those left behind from the urban exodus; thus, inclusionary zoning ordinances attempted to fill this gap.<sup>19</sup> The ordinances, by virtue of increasing production of low-cost housing, resulted in the “dispersal” or “overconcentration” of low-cost housing.<sup>20</sup> Inclusionary zoning ordinances have the effect of dispersing such concentrated poverty by requiring various percentages of low-cost units within new development projects without any real boundary restrictions.<sup>21</sup> Thus, the goal is for new development in the most northern area of a metropolitan city, for example, to produce some affordable units while a predominantly suburban enclave south of an urban center will also provide inclusionary units, thereby deconcentrating the poor.<sup>22</sup>

Virginia became the first state to implement inclusionary zoning laws.<sup>23</sup> In Fairfax County, for example, the nation’s first inclusionary zoning ordinance required development of “fifty or more [multi-family] units” to provide “not less than 6 percent low income dwelling units and not less than an additional 9 percent moderate income dwelling units.”<sup>24</sup> The ordinance, like many inclusionary ordinances today, offered developers “a density bonus,” which permitted one additional market rate unit for every two low- or moderate-income units built and also allowed for developers to fulfill the affordability requirements by relying on subsidies.<sup>25</sup>

The *Mount Laurel* decisions in New Jersey also led to one of the nation’s first inclusionary zoning laws. New Jersey courts are, to this day, heralded by some for the progressive nature in which they struck down exclusionary zoning ordinances that violated state constitutional and zon-

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18. See Thomas Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432, 1435 (1974) (noting effect of many land use regulations is to “prevent lower income people and minorities from living [in the suburbs]” and that “[l]ower income households and minorities have had little choice but to remain in the urban centers which have deteriorated rapidly”).

19. See *id.* at 1436.

20. See *id.* at 1437.

21. See *id.*

22. See *id.* at 1458.

23. The two counties to implement the schemes included Fairfax County, Virginia, and Montgomery County, Maryland. See *id.*; see also Robert W. Burchell & Catherine C. Galley, *Inclusionary Zoning: Pros and Cons*, NEW CENTURY HOUSING, Oct. 2000, at 3, 4; J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 830–31.

24. See Kleven, *supra* note 18, at 1439.

25. See *id.* at 1440 (citing Amendment 156, June 30, 1971, COUNTY OF FAIRFAX, VA., Code ch. 30, §§ 30-2.2, 2c).

ing-enabling laws. Such exclusionary ordinances barred multi-family residential developments and permitted only large-lot, single-family homes that could ordinarily be owned by middle-class families. These ordinances exacerbated segregation by class and race. In the aftermath of the *Mount Laurel* litigation, New Jersey courts required every “developing municipality” to remedy housing shortages that led to class- and race-based segregation by providing a realistic opportunity for adequate housing for its poor by loosening zoning ordinances and actively subsidizing a fair share number of units needed immediately and in the future.<sup>26</sup> Inclusionary zoning laws were one of several land use regulations enacted to fulfill these obligations.

But critics of inclusionary zoning, such as Ellickson, explain that the “irony” of the law is that it harms the very people it purports to help because beneficiaries of the policy who obtain such housing in the suburbs may feel out of place, looked down upon, and reserved to a status of the “other” in wealthier white suburbs.<sup>27</sup> Others argue that developers do not have enough incentive to commit to building in overly-regulated localities and, therefore, will look elsewhere for development opportunities; this practice results in less affordable housing, aggravates housing shortages, and becomes “self-defeating” by creating another form of exclusionary zoning.<sup>28</sup> Apart from policy considerations, inclusionary zoning has also been met with constitutional skepticism by some courts.

While Virginia was the first state to implement inclusionary zoning laws, it was, ironically, the first to strike down the ordinances as regulatory takings.<sup>29</sup> The Virginia Supreme Court found that the Fairfax County inclusionary zoning ordinance<sup>30</sup> violated the takings clause of the Virginia Constitution when Virginia exceeded its authority under the state enabling legislation.<sup>31</sup> The court acknowledged that it “appear[ed] that providing low and moderate income housing serves a legitimate public

26. See generally *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983).

27. See generally Ellickson, *supra* note 11.

28. See Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 212 (1991).

29. See *supra* note 23.

30. See Kleven, *supra* note 18, at 1436–39. Zoning laws that directly targeted social and economic issues—or, as J. Gregory Richards states, “direct social control”—such as inclusionary zoning, were implemented by mostly suburban municipalities to avoid exclusionary zoning litigation, satisfy the housing needs of retiring residents or adult children of present residents, or attract lower-paid workers needed in the relevant area with appropriate housing opportunities. See *id.* at 1439; see also Richards, *supra* note 23, at 799–807; Jerome G. Rose, *The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning*, 3 REAL EST. L.J. 176 (1974).

31. See *Bd. of Supervisors v. DeGroff Enters., Inc.*, 198 S.E.2d 600, 602 (Va. 1973). The ordinance required a developer who constructed a development of more than fifty units to set aside “at least [fifteen] percent of [those units] as low and moderate income housing” in response to Fairfax County’s “uncontroverted evidence” showing a strong need for 10,500 low-cost units. See *id.* at 601.

purpose” because it attempts to provide for the health, safety, and welfare of the residents, but that previous exclusionary ordinances had been struck down because they “depriv[ed] . . . owner[s] the beneficial use of [ ] property,” which acted more like a “confiscatory” practice.<sup>32</sup> Thus, the court said that such practices did not permit local governments to “control compensation for the use of lands” and that requiring fifteen percent affordable units exceeded the authority granted by the zoning enabling act.<sup>33</sup>

However, the court decided that such ordinances were equally problematic, not because the purpose was for the general welfare of the poor, but rather unconstitutional because it unfairly targeted developers “without just compensation.”<sup>34</sup> The court was concerned with the nature and effect of the inclusionary mechanism on the developer, stating that “[o]f greater importance . . . the [ordinance] . . . violates the guarantee . . . that no property will be taken or damaged for public purposes without just compensation.”<sup>35</sup> Fairfax County reverted to a voluntary inclusionary zoning law to avoid the uncompensated takings issue.

The mandatory inclusionary devices also triggered regulatory takings challenges in *Mount Laurel II*. But unlike the Virginia Supreme Court, the New Jersey Supreme Court made curt treatment of the challenge, rejecting the uncompensated takings claims and upholding the required set-aside schemes.<sup>36</sup> The court found that the *Mount Laurel* doctrine—which provides for a “realistic opportunity for the construction of lower cost housing” through inclusionary devices such as “mandatory set-aside programs,” density bonuses or in-lieu fees—was “constitutional and within the zoning power of a municipality.”<sup>37</sup> Relying on prior takings challenges, the court said if the permitted use under the zoning ordinance was “related to the physical use of the land,” then courts would dismiss confiscatory takings claims.<sup>38</sup> In other words, a zoning ordinance that permitted

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32. *See id.*

33. *See id.* at 602.

34. *See id.*

35. *See id.*

36. *See Mount Laurel II*, 456 A.2d 390, 444, 448 (N.J. 1983) (holding inclusionary zoning ordinances constitute neither taking nor substantive due process violation). Inclusionary zoning also has been attacked on grounds of due process and equal protection.

37. *See id.* at 447–48.

38. *See id.* at 448. The *Mount Laurel II* court reasoned that if a limitation permitting only mobile homes for the elderly suffices, then the comparable special need of lower income families for housing, and its impact on the general welfare, could justify a district limited to such use and certainly one of lesser restriction that requires only that multi-family housing within a district *include* such use (the equivalent of a mandatory set-aside). Since the objective here goes beyond serving the special needs of a particular class of citizens for the general welfare and extends to the fulfillment of a constitutional obligation, the constitutionality of such devices, and the power of the municipality to impose them, is even clearer.



only “mobile homes for the elderly,” for example, was justified under the police power because “the special housing needs of the elderly served the general welfare.”<sup>39</sup> Likewise, the court reasoned that inclusionary zoning ordinances were no different, even if they focused on remedying social and economic patterns of segregation and concentrated poverty.<sup>40</sup> If deep, concentrated poverty and access to affordable housing were key to the general welfare of the residents located within the municipality, then a land use regulation that triggered more affordable housing would be satisfied under general police powers and would survive regulatory takings challenges.

It did not matter to the New Jersey Supreme Court that landowners or builders were compelled to engage in an economic activity—construction of affordable housing—they otherwise would not have engaged in initially. The goal of these “economically efficient operator[s]” was “to obtain a ‘just and reasonable’ return on . . . investment.”<sup>41</sup> The developer must show that the inclusionary unit requirement will return a profit “so low as to amount to a taking.”<sup>42</sup> Thus, without more than *some* depreciation in value or some decrease in profit that “effectuate[s] a deprivation of property,” courts have found inclusionary zoning to pass constitutional muster under a regulatory takings theory.<sup>43</sup> California, too, has been a model for inclusionary zoning laws.

The Cities of Napa and San Jose enacted ordinances that require ten percent of newly constructed housing to be affordable.<sup>44</sup> As expected, the builders and real estate industries challenged the ordinances as regulatory takings and exactions under federal and state constitutional law.<sup>45</sup> But courts have noted there is “no doubt that creating affordable housing for

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. . . . We find the distinction between the exercise of the zoning power that is “directly tied to the physical use of the property” and its exercise tied to the income level of those who use the property artificial in connection with the *Mount Laurel* obligation . . . .

*Id.* at 448–49 (citations omitted).

39. *See id.* at 448; *see also* *Shepard v. Woodland Twp. Comm. & Planning Bd.*, 364 A.2d 1005, 1012–13 (N.J. 1976); *Taxpayers Ass’n of Weymouth Twp., Inc. v. Weymouth Twp.*, 364 A.2d 1016, 1030 (N.J. 1976); *DeSimone v. Greater Englewood Hous. Corp. No. 1*, 267 A.2d 31, 37 (N.J. 1970).

40. *See Mount Laurel II*, 456 A.2d at 449.

41. *See In re Egg Harbor Assocs. (Bayshore Ctr.)*, 464 A.2d 1115, 1123 (N.J. 1983) (quoting *Hutton Park Gardens v. W. Orange Town Council*, 350 A.2d 1 (N.J. 1975)).

42. *See id.*

43. *See id.*

44. *See, e.g.,* *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974, 977 (Cal. 2015); *Home Builders Ass’n of N. Cal. v. City of Napa*, 90 Cal. App. 4th 188, 191–92 (Ct. App. 2001) (noting “[c]ity [of Napa] . . . enact[ed] [an] inclusionary zoning ordinance”).

45. *See id.* 195, 199 (rejecting takings and due process challenge because ordinance advanced legitimate state interest, provided economic benefits to developers, and provided “administrative relief” to those who demonstrated lack “of any reasonable relationship or nexus” under development exactions tests).

low and moderate income families is a legitimate state interest” that passes the substantially advances test<sup>46</sup> and that inclusionary methods under zoning ordinances increase the supply of affordable housing by requiring developers to provide housing at an affordable rate.<sup>47</sup> In-lieu fee requirements have also withstood regulatory takings challenges.<sup>48</sup> It is unclear, however, whether a *Penn Central* “per se takings” challenge to inclusionary zoning ordinances would suffice because “[t]he economic impact would be mitigated by the regulatory relief offered . . . [a]nd the impact on distinct reasonable investment-backed expectations would be limited.”<sup>49</sup> Thus, it would likely be deemed a justified effort by the municipality “to balance economic benefits and burdens in order to serve the general welfare.”<sup>50</sup>

The California Supreme Court opinion in *California Building Industry Ass’n v. City of San Jose*<sup>51</sup> is arguably the most decisively persuasive decision on the legitimacy of inclusionary zoning under state constitutional law and state zoning laws. There, the San Jose ordinance required fifteen percent of for-sale units to be affordable.<sup>52</sup> The court found such a regulation to be exactly that—a mere land use regulation that did not rise to an unconstitutional exaction.<sup>53</sup> The building industry’s attack was premised on a theory of “unconstitutional conditions” doctrine that originated from the Supreme Court’s *Nollan* and *Dolan* tests.<sup>54</sup> The California Supreme Court,

46. *See id.* at 196.

47. However, some state courts have yet to invalidate an inclusionary zoning ordinance as either a permanent physical occupation or a total taking under the regulatory takings categorical tests. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 449 (1982); *Fla. Home Builders Ass’n, Inc. v. City of Tallahassee*, No. 37 2006 CA 000579, 2007 WL 5033524, at \*5 (Fla. Cir. Ct. Nov. 20, 2007) (“[T]he Ordinance does not allow the City or anyone else to encroach on a developer’s land. The Ordinance only applies when a landowner voluntarily decides to develop property in a certain manner. A developer’s decision to develop in a manner covered by the Ordinance is a voluntary act on the part of a developer.”). *But see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031–32 (1992); *Travis v. Cty. of Santa Cruz*, No. H021541, 2004 WL 2801083, at \*9 (Cal. Ct. App. Dec. 6, 2004) (holding ordinance was not unlawful regulatory taking because “conditions did not deprive” owner of all economically-viable use of property).

48. *See Holmdel Builders Ass’n v. Twp. of Holmdel*, 583 A.2d 277, 295 (N.J. 1990); *see also Home Builders Ass’n of N. Cal.*, 90 Cal. App. 4th at 197 (declining to subject fees to heightened judicial scrutiny).

49. *See Tim Iglesias, Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, ZONING & PLANNING REP., Apr. 2013, at 1, 2.

50. *See id.* at 6; *see also Cal. Bldg. Indus. Ass’n*, 351 P.3d at 996.

51. 351 P.3d 974 (Cal. 2015).

52. *See id.* at 978.

53. *See id.* at 1000–04. The court found the in-lieu fee provision, an alternative option to the mandatory set-aside scheme, to be a valid exaction under certain provisions of the Mitigation Fee Act. *See id.* at 996–1004.

54. *See generally Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). *Nollan* and *Dolan* apply when a regulation requires a private developer to dedicate a property interest for public use as a condition to receiving a land use permit in a situation where it would be a taking if

unpersuaded that an affordable housing requirement is an unlawful exaction, noted that the conditions imposed by the inclusionary zoning ordinance were valid only if the municipality produced evidence demonstrating that the requirements were reasonably related to the adverse impact on the municipality's affordable housing shortages.<sup>55</sup> But the court reasoned that such inclusionary conditions are not exactions on the developer's property so as to bring into play the unconstitutional conditions doctrine under the Takings Clause. Additionally, the condition served the intended purpose of increasing the number of affordable housing units in a municipality "in recognition of the insufficient number of existing affordable housing units" and "assur[es] that new affordable units [ ] are . . . distributed throughout the city," which is well within the police power of zoning for health, safety, and general welfare.<sup>56</sup> As other California state courts have determined, "there can be no valid unconstitutional-conditions takings claim without a government exaction of property," and an ordinance requiring a set-aside number of affordable units in new development "does not effect an exaction," but is instead merely a land use regulation subject to review under the police power standards.<sup>57</sup>

Even applied to *Koontz v. St. Johns River Water Management District*,<sup>58</sup> the unconstitutional conditions doctrine recognizes real property interests, but monetary land use permit conditions in inclusionary zoning ordinances are "at least somewhat ambiguous."<sup>59</sup> Thus, in places like California, the *Nollan* and *Dolan* jurisprudence applies in inclusionary zoning challenges only when the government "demand[s] the conveyance of some identifiable protected property interest" to the government by the developer for the public use "as a condition of [a land use] approval."<sup>60</sup>

Inclusionary zoning seems to have survived the onslaught of regulatory takings challenges for the time being. One wonders what the Supreme Court would make of a case like *California Building Industry Association*. Indeed, the nature of an ordinance that requires some below-market units alongside market-rate units is not necessarily confiscatory because "the builder who undertakes a project that includes a mandatory set-aside voluntarily assumes the financial burden, if there is any, of that con-

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the government required the dedication of the property outside of the permit process to serve its objective. In *Nollan*, the property interest was an easement. See *Nollan*, 483 U.S. at 827–28. In *Dolan*, it was a dedication of a strip of land in fee simple. See *Dolan*, 512 U.S. at 379.

55. See *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 41 P.3d 87, 111 (Cal. 2002); *Bldg. Indus. Ass'n of Cent. Cal. v. City of Patterson*, 171 Cal. App. 4th 886, 898 (2009).

56. See *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 979.

57. See *id.* at 988.

58. 133 S. Ct. 2586 (2013).

59. See *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 990 (citing *Koontz*, 133 S. Ct. at 2599).

60. See *id.*

dition.”<sup>61</sup> Even in the absence of a state or federal subsidy to off-set the below-market requirements, “those units may be priced low not because someone else is subsidizing the price, but because of realistic considerations of cost, amenities, and therefore underlying values.”<sup>62</sup> The advent of inclusionary zoning legislation provides ample parallels for how the exercise of a similar police power under eminent domain codes may achieve the same or substantially the same affordable housing results for localities—whether suburban or urban—struggling to construct or preserve affordable housing.

### III. INCLUSIONARY TAKINGS LEGISLATION

Just as zoning laws were creatively amended to spur affordable housing construction, eminent domain codes are likewise positioned to achieve similar potential results. The exclusionary effect of takings in low-income communities is well documented and mirrors the same exclusionary effects of zoning.<sup>63</sup> The seminal takings case, *Berman v. Parker*,<sup>64</sup> is a primary example of the exercise of eminent domain that excludes the poor from new development. Affordable housing was at the center of the debate in *Berman*, where a D.C. state administrative agency exercised eminent domain for slum removal and prevention purposes.<sup>65</sup> The Supreme Court found that the broader definition of public use included taking property that would benefit areas designated as slums.<sup>66</sup> This conclusion arguably gave municipalities carte blanche to take private property and convey it to private entities as a public use under the guise of urban renewal.<sup>67</sup> The problem with *Berman* was that the housing originally promised by the local government to replace the razed slum dwellings “were never substantiated.”<sup>68</sup> Indeed, eminent domain as a tool for displacement dates back to the failed urban renewal era.<sup>69</sup> *Berman* normalized the municipal practice

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61. See Mount Laurel II, 456 A.2d 390, 446 n.30 (N.J. 1983).

62. See *id.*

63. See, e.g., *Berman v. Parker*, 348 U.S. 26, 34–35 (1954).

64. 348 U.S. 26 (1954).

65. See *id.* at 30, 34–35.

66. See *id.* at 36 (“It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.”).

67. See, e.g., *id.* at 30–31. The municipality proposed the construction of affordable housing for low-income families in an effort to convince the court that the taking was justified for economic redevelopment purposes. See *id.* (noting development plan for area “[made] detailed provisions for . . . [low cost] housing”).

68. See Keasha Broussard, Note, *Social Consequences of Eminent Domain: Urban Revitalization Against the Backdrop of the Takings Clause*, 24 LAW & PSYCHOL. REV. 99, 105 n.51 (2000) (citing Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of the Community*, 25 IND. L. REV. 685, 730–31 (1991)).

69. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 22–24 (2003).

of designating property located within a “blighted” neighborhood as “blighted,” even though the property did not show the ordinary signs of blight.<sup>70</sup>

Even today, the notion of substituting old, debilitated housing with new housing when clearing slums is a contentious matter. This exclusionary phenomenon causes a loss of affordable housing and subsequently displaces residents from one neighborhood to another.<sup>71</sup> And similar to exclusionary zoning, the effect of these types of condemnations excludes the poor from wealthier neighborhoods.<sup>72</sup> As Parlow notes, municipalities “often use their power to raze” affordable properties “[b]y taking such affordable housing [units] off the market by their exercise of eminent domain power.”<sup>73</sup> Such abuse of eminent domain creates a cycle that “reduce[s] the available housing stock for low-income residents as such units are usually replaced by new high-end commercial, residential, and mixed-use projects.”<sup>74</sup> This result occurs in light of the fact that municipalities also fail to use the power to construct low-cost housing. Why?

If a plot of vacant or abandoned land sits idle, then the municipality has an incentive to lure commercial developers to negotiate the sale and purchase of the land after condemnation in order to reap the tax-generating benefits of new development. Affordable housing development, on the contrary, may be unable to produce the same tax revenue benefits as commercial development. Taking private property for the public benefit of affordable housing may simply be economically fruitless because the tax benefits and rewards for the locality are minimal. Thus, “cities will rarely prioritize affordable housing projects above other development projects.”<sup>75</sup>

In conceiving of takings legislation that might achieve similar housing results as inclusionary zoning legislation, it is necessary to look specifically to a prominent passage from the *Kelo* decision that gave way to one of the most expansive state legislative reforms of constitutional property. Justice Stevens wrote:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings

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70. See *Berman*, 348 U.S. at 34–35.

71. See Dana, *supra* note 2, at 8.

Exercises of what I am calling “exclusionary eminent domain” are *doubly* exclusive because the displaced residents are unable to afford new housing in the same neighborhood or locality as their now-condemned, former homes. In exclusionary eminent domain, low-income[ ] households are excluded not only from their homes but also from their home neighborhood or locality.

*Id.*

72. See *id.*

73. See Parlow, *supra* note 1, at 856.

74. See *id.* at 856–57.

75. *Id.* at 856.

power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.<sup>76</sup>

In this passage, the Supreme Court cited the Michigan Supreme Court’s decision in *County of Wayne v. Hathcock*<sup>77</sup> for the proposition that states could enact restrictions on eminent domain that were stronger than that provided by the U.S. Constitution.<sup>78</sup> For example, some states amended eminent domain codes to exempt preexisting public uses from a ban on takings for “economic development purposes”<sup>79</sup> or to exempt blight takings from the ban on economic development takings.<sup>80</sup> Other states reformed codes in keeping with urban redevelopment, prohibiting eminent domain except when it is exercised for the purpose of “urban renewal.”<sup>81</sup> Some legislatures have redefined blight to include an area that “retards the provision of housing accommodations or constitutes an economic or social liability.”<sup>82</sup> Further, “eleven state supreme courts have invalidated economic development takings” under state constitutions.<sup>83</sup>

Some states also amended their constitutions to prohibit “the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues,”<sup>84</sup> while some legislatures have limited the blight removal exception to takings for the public purpose of removing “a threat to public health or safety caused by the existing use or disuse of the property.”<sup>85</sup> However, other states allowed municipalities to retain the power to take private property for purposes of “utility and infrastructure,” along with a “blight exception,” provided that the municipality takes “without consideration of economic development and revenue generation.”<sup>86</sup> Likewise, other states explicitly legislated to

76. See *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (footnote omitted) (citing California’s Health and Safety Code as example).

77. 684 N.W.2d 765 (2004).

78. See *Kelo*, 545 U.S. at 489.

79. See ALASKA STAT. ANN. § 09.55.240(d) (West 2016).

80. See MO. ANN. STAT. § 523.271 (West 2016).

81. See VT. STAT. ANN. tit. 12, § 1040(a) (West 2016).

82. See W. VA. CODE ANN. § 16-18-3(c) (West 2016).

83. See Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, *supra* note 1, at 187. “These eleven states are Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, Ohio, Oklahoma, South Carolina, and Washington.” *Id.* n.17.

84. See MICH. CONST. art. X, § 2; see also LA. CONST. art. I, § 4(B); S.B. 1, 2006 Leg., Reg. Sess. (La. 2006); S.J. Res. E, 93d Leg., Reg. Sess. (Mich. 2005).

85. See LA. CONST. art. I, § 4(B)(2)(c).

86. See Marc Mihaly & Turner Smith, *Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 712 (2011).

prohibit takings that “confer[ ] a private benefit on a particular private party through the use of the property.”<sup>87</sup>

The legislative backlash against the expansion of eminent domain showed a willingness on the part of state actors to thwart undesirable justifications for taking private property, such as private-to-private conveyances. Concerns for the health and safety of the community drove the public sentiment about the increasing role of eminent domain in urban areas, especially where middle-class homes were subject to takings, as evidenced in *Kelo*. As local governments “struggle[d] to provide public services with limited financial resources, governmental authorities [were] encouraging more intensive economic development to generate additional tax revenue, to create new jobs and to jump start local economies.”<sup>88</sup>

Proponents of the *Kelo* decision and legislative response range from Richard Posner to John Roberts, both of whom noted that the backlash was an example of private property rights being protected through the political sphere and not relying on the judiciary to intervene.<sup>89</sup> But critics such as Ilya Somin disagrees with the notion that “judicial intervention [in *Kelo*] may be unnecessary” to protect private property rights.<sup>90</sup> Somin posits that the legislative reform heralded by Posner and Roberts was composed of merely “cosmetic” amendments<sup>91</sup> because the reforms left blight removal exceptions intact, giving municipalities carte blanche to condemn private property under the veil of blight removal as a pretext for private developers to engage in economic development.<sup>92</sup> As a result, David Dana

87. See *id.* at 717 (quoting Tex. Gov’t. Code Ann. §2206.001(b) (West 2008)).

88. See *Kelo v. City of New London*, 843 A.2d 500, 581 (Conn. 2004) (Zarella, Sullivan, and Katz, JJ., concurring in part and dissenting in part), *aff’d*, 545 U.S. 469 (2005).

89. See Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, *supra* note 1, at 244 (citing Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 98 (2005)).

90. See *id.*

91. See Somin, *The Limits of Backlash*, *supra* note 1, at 2103–04.

92. See NEV. CONST. art. I, § 22, cl. 1 (forbidding transfer of “any interest in property taken in eminent domain proceeding from one private party to another private entity”); ALASKA STAT. ANN. § 09.55.240 (West 2016) (exempting preexisting public uses declared in state law from ban on takings for economic redevelopment); COLO. REV. STAT. ANN. § 31-25-103(2) (West 2016) (defining “blighted area”); COLO. REV. STAT. ANN. § 38-1-101 (West 2016) (allowing takings for eradication of blight); FLA. STAT. ANN. § 73.014 (West 2016) (banning blight condemnations and economic development takings without mentioning that state has substantially used law for blight condemnations); KAN. STAT. ANN. § 26-501b(e) (West 2016) (limiting blight condemnations to instances where property is “unsafe for occupation by humans under the building codes”); MO. REV. STAT. § 523.271(2) (West 2016) (exempting blight takings from ban on economic development takings); NEB. REV. STAT. ANN. §§ 18-2103, 18-2123, 76-710.04 (West 2016) (exempting “blight” condemnations from ban on economic redevelopment takings); N.C. GEN. STAT. ANN. § 160A-503 (West 2016) (exempting blight condemnations from restrictions on takings for public purpose of economic redevelopment); OHIO REV. CODE ANN. § 163.021 (West 2016) (allowing eminent domain of

argues that the specter of exclusionary eminent domain remains a threat to displacement of the poor from urban areas in light of blight removal exceptions.

Takings for blight removal have been documented to disproportionately target poor neighborhoods, thereby depleting the supply of affordable housing.<sup>93</sup> As Justice Thomas noted in his *Kelo* dissent, eminent domain takings for economic development or blight removal have historically impacted minority communities.<sup>94</sup> Wendell Pritchett's work on the history of urban redevelopment and renewal substantiates Thomas's claim, showing that the poor have been disproportionately subject to displacement and exclusion by blight removal condemnations.<sup>95</sup> Somin and Dana note that both economic development and blight removal takings, taken together, victimize the poor because such condemnations tend to target blighted neighborhoods more likely to be occupied by the poor, rather than by wealthier, middle-class families.<sup>96</sup> Somin notes, however, that "post-*Kelo* reform has not noticeably exacerbated the problem [of displacement]" and that reforms that allow blight condemnations to affect *some* poor neighborhoods may be better than reforms that do not protect any neighborhoods.<sup>97</sup> The rationale behind this argument is that despite middle-class neighborhoods yielding more in tax revenue compared to poor neighborhoods—thus presumably making condemnation in middle-class neighborhoods less attract to a municipality—the reality is that municipalities will inevitably conclude that neither type of neighborhood "yields nearly as much in tax revenue as compared with redevelopment projects, if completed, that produce" a projected revenue increase that is preferable to both options.<sup>98</sup> But empirical research prior to *Kelo* evidences that condemnation for urban renewal and urban development,

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blighted areas for public uses if certain conditions are met); TEX. GOV'T CODE ANN. § 2206.001 (West 2016) (exempting "blight" condemnations from ban on economic development takings); UTAH CODE ANN. § 17C-1-202 (West 2016) (revising code to omit power given in previous version of code to use eminent domain for blight alleviation or redevelopment); VT. STAT. ANN. tit. 12, § 1040 (West 2016) (prohibiting eminent domain except when exercised for purpose of "urban renewal"); W. VA. CODE ANN. § 16-18-3 (West 2016) (exempting blight condemnation from ban on economic development takings and defining blight to include area that "retards the provision of housing accommodations or constitutes an economic or social liability"). As noted by Somin, these states "categorically forbid virtually all economic development takings." See Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, *supra* note 1, at 187.

93. See Dana, *supra* note 2, at 22.

94. See *id.* at 12 n.9 (discussing dissent).

95. See generally Pritchett, *supra* note 69.

96. See generally Dana, *supra* note 1; Somin, *Controlling the Grasping Hand*, *supra* note 1; Somin, *Is Post-Kelo Reform Bad for the Poor?*, *supra* note 1.

97. See Somin, *Is Post-Kelo Reform Bad for the Poor?*, *supra* note 1, at 1936.

98. See Carpenter & Ross, *supra* note 1, at 2451.



nonetheless, had disastrous effects on poor and minority communities.<sup>99</sup> Further, post-*Kelo* empirical research tends to confirm the concerns of *Kelo* dissenters, Justices Thomas and O'Connor, evidencing "the disproportionate effects of economic development takings on minorities and the poor."<sup>100</sup> Justice Thomas relied upon this evidence and history to predict that the majority's decision in *Kelo* would "exacerbate these effects."<sup>101</sup>

As Thomas Merrill has noted in his testimony before the Senate Judiciary Committee, blight as a precondition for economic development takings seems designed largely to reassure the middle class that its property will not be targeted for such projects, not to protect the very poorest communities.<sup>102</sup> If some blight is a requirement for a blight removal taking or an economic development taking, then developers and municipalities will be more likely to target revitalization efforts in poor and minority areas instead of middle-class neighborhoods, where designating property as blighted is more difficult to achieve.<sup>103</sup> Indeed, the recent empirical research by Carpenter and Ross on the effects of economic development takings confirms well-established research on the link between urban renewal and redevelopment and poor displacement, thereby contradicting the assertions of scholars who deny the exclusionary effects.<sup>104</sup> The socioeconomic consequences of exclusionary condemnations on account of low-cost housing has received less empirical attention, and thus far, scholarly commentary seems to suggest anecdotal evidence of a shortage of low-cost housing as a result of economic development or blight removal condemnations.<sup>105</sup>

Nonetheless, the aftermath of *Kelo* may actually have resulted in a perverse impact on affordable housing in dense urban areas because takings for economic development or blight removal are likely to target low-income neighborhoods and result in a shortage, not an increase, in low-cost housing.<sup>106</sup> Indeed, the post-*Kelo* legislative loopholes have played a significant role in shaping landscapes for economic development, yet imposing no obligations for affordable housing. As Matthew Parlow notes, *Kelo*

99. See generally BERNARD FRIEDEN & LYNNE SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES (1989); JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED (1989).

100. See Carpenter & Ross, *supra* note 1, at 2456.

101. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting).

102. See *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14–16 (2005) (statement of Thomas W. Merrill).

103. See Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 676 (2007).

104. See Carpenter & Ross, *supra* note 1, at 2455–57.

105. See David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, 32 VT. L. REV. 129, 132, 133–34, 137, 142 (2007) (noting absence of empirical scholarship).

106. See *id.* at 131–33 (noting many scholars theorize that ban on takings to cure blight will result in "less development . . . in poor urban areas").

did nothing to “stem the tide of affordable housing casualties of eminent domain . . . [and] many states have responded to *Kelo* by introducing blight-only legislation that will ultimately reduce the availability of affordable housing.”<sup>107</sup> Yet, even assuming that there is a lack of evidence that post-*Kelo* reform did not cause greater displacement, it is arguably the case that the reform measures did not address the exclusionary history of blight condemnations, and therefore, the amendments did little to fight a problem that clearly existed and may still exist.<sup>108</sup> At the very least, the problem of exclusionary takings poses as a serious threat to poor residents and poor neighborhoods in light of blight exceptions and loopholes. This “exclusionary” phenomenon of eminent domain, like exclusionary zoning, may require legislative treatment instead of doctrinal treatment to fend off increased loss of affordable housing from economic development and blight removal takings.<sup>109</sup>

To facilitate inclusive collaboration on affordable housing construction, elsewhere I have proposed the use of land assembly tools such as “Community Benefits Agreements [ ], Land Assembly Districts [ ], Community Development Corporations [ ], Community Land Trusts [ ], Land Banks [ ], and Neighborhood Improvement Districts” under “the concept of inclusionary eminent domain.”<sup>110</sup> Further, these tools “give[ ] private developers, municipalities, and communities a more transparent set of tools that guide the development process to reduce the phenomena of displacing residents and decreasing the supply of affordable housing.”<sup>111</sup>

“Legislation in most states *enables* to some degree—but does not *require* or *mandate*—communities, municipalities, and private developers to utilize” the inclusionary eminent domain tools for economic development purposes.<sup>112</sup> But nothing in the law today mandates this type of meaningful engagement and collaboration in eminent domain takings for economic development.<sup>113</sup> The tools are voluntary, and if left unchecked, the practice of inclusionary eminent domain may fail more often than not.<sup>114</sup> The failure of voluntary land use devices is readily apparent in

107. See Parlow, *supra* note 1, at 860 (citing several examples of “blight-only [takings] legislation”).

108. See Dana, *supra* note 2, at 23 (“Eminent domain law, pre-and post-*Kelo*, does not address the exclusion of low-income households as a distinct problem or concern.”).

109. See *id.* at 22.

110. See Dickinson, *supra* note 3, at 847.

111. *Id.*

112. See *id.* at 888.

113. One notable exception is the Uniform Relocation Act (URA). See 42 U.S.C. §§4601–4655 (2012). The Act, passed by Congress in 1970, establishes minimum standards for federally funded projects that displace persons from their homes, businesses, or farms, and apply to the acquisition, rehabilitation, or demolition of property for federally-funded projects.

114. See Dick Carpenter, *Comment on Carpenter and Ross (2009): Eminent Domain and Equity—A Reply*, 48 URB. STUD. 3621, 3624–25 (2011). Carpenter writes that “[w]ithin the socio-political framework, we find it to be a naïve notion that such

zoning, where most voluntary inclusionary zoning ordinances, due to their voluntary nature, “produce very few units.”<sup>115</sup> Thus, mandatory zoning programs became far more effective at creating affordable units. Likewise, giving legislative effect to inclusionary eminent domain may “result[ ] in a more generous and definite commitment for the creation of new affordable housing.”<sup>116</sup> As Dana noted shortly after the *Kelo* decision, there has not been any action to enact laws to impose any legal requirements “designed to alleviate the shortage of . . . affordable housing in urban areas.”<sup>117</sup> Indeed, the complementary role of the legislature as a guardian of the takings power requires further examination.<sup>118</sup> Below is an example of how an inclusionary takings statute might be framed.<sup>119</sup>

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communitarian structures somehow ameliorate the downside effects of eminent domain in redevelopment . . . [and] CBAs . . . mak[ing] the process more beholden to powerful interests, not less.” *Id.* These same sentiments appear in Rick Hills and Michael Heller’s “land assembly districts” proposal, which would give neighborhood property owners the power “to approve or disapprove” eminent domain takings. See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1467–69 (2008) (arguing legislatures should adopt “land assembly districts” to protect property rights).

115. See Bernard Tetreault, *Arguments Against Inclusionary Zoning You Can Anticipate Hearing*, NEW CENTURY HOUSING, Oct. 2000, at 17, 19–20; see also Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 982 (2002) (citing Marc T. Smith et al., *Inclusionary Housing Programs: Issues and Outcomes*, 25 REAL EST. L.J. 155, 164 (1996)) (stating voluntary programs are ineffective at producing units because developers have no incentive to participate); Benjamin Powell & Edward Stringham, “*The Economics of Inclusionary Zoning Reclaimed*”: *How Effective Are Price Controls?*, 33 FLA. ST. U. L. REV. 471, 475 n.25 (2005) (arguing failure of voluntary ordinances to produce affordable units is due to “the very nature of the economics of inclusionary zoning”).

116. See Dana, *supra* note 2, at 12.

117. See Dana, *supra* note 1, at 378–79.

118. See *Kelo v. City of New London*, 543 A.2d 500, 581 (Conn. 2004) (Zarella, Sullivan, and Katz, JJ., concurring in part and dissenting in part), *aff’d*, 545 U.S. 469 (2005).

119. Legal scholars once “bemoan[ed] legislation’s ‘second-class’ status as an academic discipline.” See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691 (1987). However, other scholars argue that scholarly attention toward the law from a legislative and statutory angle—or “legisprudential” viewpoint—is important for understanding general theories of the law. See, e.g., HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1958); Julius Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163 (1983); Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950). Abbe Gluck is one of the leading scholars to bring statutory interpretation and legislation from a federalism-oriented lens to the forefront of legal scholarship again. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013). The statutory proposal in this Article is merely a sketch or blueprint of how an inclusionary takings statute *might* be framed. Thus, the Author cautions that the inclusionary takings statute proposed here is not meant to be lifted from the pages of this

Prohibition of Eminent Domain for Economic Development and Blight Removal.

(a) Prohibition. Except as set forth in subsection (b), the exercise of eminent domain by a condemning agency authorized with such power is prohibited for the public purpose of economic development, private enterprise, or blight removal.

(b) Exception. A condemning agency may condemn private property for the public purpose of economic development or blight removal if it proves, by clear and convincing evidence, adoption of an affordable housing plan through good faith negotiations with affected landowners and a private developer, the purpose of which is to ameliorate social and economic liability within the condemned area.<sup>120</sup>

Section (a) implicitly acknowledges that economic development and blight removal takings are constitutionally justifiable public purposes as a result of *Kelo*. However, this section also channels the post-*Kelo* reform by statutorily prohibiting both types of takings except as permitted by Section (b). Thus, Section (b) is the inclusionary takings provision. Reading the two sections together, the state cannot undertake economic development or blight takings unless it adopts an affordable housing plan that triggers the construction of low-cost housing on the economic development site. The bill or amendment, depending on the language of the existing eminent domain code of the state, would provide an additional legislative mechanism to trigger and enforce affordable housing construction.<sup>121</sup> A state legislative initiative, as opposed to a local municipal ordinance, is arguably a stronger legal maneuver because there is well-established precedent of state legislatures, rather than local governments, taking assertive actions concerning land use decisions that shape urban environments. Further, state legislatures are, for the most part, removed from the local politics of local government that often inhibits adherence to land use processes and procedures.

The inclusionary takings provision sets forth the conditions for which the local municipality and private developer may exercise eminent domain powers, mandating *some* housing contributions on the newly condemned land designated for economic development or blight removal.

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Article and inserted into legislative bills seeking to enact similar laws that trigger housing construction through eminent domain codes, but carefully weighed and considered—and perhaps tweaked according to the current state of affairs concerning affordable housing supply in certain localities. It is important, nonetheless, for legal scholars to think about both state and federal legislative changes to achieve law reform in addition to traditional constitutional and doctrinal analyses.

120. This proposed “inclusionary takings” legislation was drafted by the Author and is not based on any particular state law. However, as noted throughout the Article, the proposed legislation would fall under an existing eminent domain code, most of which provide language authorizing takings for specific public uses.

121. See Dickinson, *supra* note 3, at 876.

The applicant seeking to exercise eminent domain—ordinarily a local municipality, but potentially a developer—has a heightened burden to establish that the proposed exercise of eminent domain constitutes not only a valid public use, such as economic development or blight removal, but also that it negotiated in good faith with the affected community and landowners prior to pursuing condemnation.<sup>122</sup>

The affordable housing plan submitted during condemnation proceedings would likely require intricate details, including rate of affordability, percentage of affordable units, and the location of those units within the economic development project. The underlying purpose of the conditional provision would be to ensure that the municipality and developer provide details of the location of affordable housing construction and that landowners and other residents affected are identified and provided access to the affordable housing units in light of displacement by the taking. It is possible that the municipality could forgo negotiations directly with the developer and craft the housing plan itself, setting forth its own plan to allocate publicly-financed affordable units on the economic development site. However, given the lack of federal and state funding available today for low-cost housing, it is more likely that the municipality would encourage negotiations with the developer to help foot the bill.

The essence of the provision, broadly, is to address various underlying public benefits beyond simply economic development. Specifically, inclusionary takings address concerns over the fair treatment of affected landowners located in the condemned area and require evidence of the resources necessary for housing development and construction. Further, the submission of an affordable housing plan ensures that affected landowners and the general community understand and have knowledge of the scope, breadth, and depth of the impact of the condemnation and subsequent economic development project on their property. This is all in keeping with the police power to legislate for the health, safety, and general welfare of the people.

The housing condition does not necessarily set a minimum percentage of affordable housing units like inclusionary zoning laws do, although the provision could set a ceiling. However, consistent with the innovative density bonus and set-aside schemes used in inclusionary zoning, one could imagine a state legislature requiring localities and developers to conduct regional housing assessments as another condition before a municipality initiates condemnation proceedings for economic development

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122. Declarations of takings are ordinarily exercised by a municipality or delegated urban development corporation. However, the Dudley Street Neighborhood Initiative in Boston is one “instance in the United States” of condemnation authority being delegated by the state to non-profit organizations with the goal of preserving affordable housing. See Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1712–13 (2007) (noting Dudley Street example is “the only instance in the United States” of such delegation of condemnation authority).

or blight removal.<sup>123</sup> If there is a strong need for affordable housing within the locality, then the municipality may be required to provide evidence of higher percentages of affordable housing units.

The chief result of an inclusionary takings statute is that it goes beyond what inclusionary zoning could achieve in the context of community collaboration and engagement with local municipalities, private developers, and landlords. Inclusionary takings legislation essentially coerces municipalities and private developers into building low-cost housing and prohibits them from avoiding the responsibility for affordable housing shortages, while simultaneously encouraging and facilitating a process which most major land assembly projects should emulate—inclusionary eminent domain.<sup>124</sup>

The proposed inclusionary takings statute effectively facilitates practice of inclusionary eminent domain through legislation by “encourag[ing] a constructive, three-way engagement process and partnership among the community, private developer and municipality where condemnation [looms].”<sup>125</sup> As mentioned, “[i]nclusionary eminent domain shows us *how* private developers and municipalities can reconcile a development project in accordance with the needs and wants of the affected community.”<sup>126</sup> Indeed, “[e]minent domain takings should temper and enable . . . economic redevelopment to flourish,” and this process is normatively strengthened by legislation mandating municipalities and private developers to work with affected communities.<sup>127</sup>

Take, for example, another tool of inclusionary eminent domain: community land trusts. Under the proposed statute, a municipality and private developer could agree on structuring a portion of the condemned land as a community land trust and offer the proposed community land trust scheme as evidence of an affordable housing plan within the proposed economic development project at condemnation proceedings. The agreement would allow for community members, who otherwise may be displaced from the area, to have a property interest in the affordable housing development that sits above the land owned and operated by the community land trust. The municipality or the land trust would have the right of first refusal for purposes of sale so that the housing units remain affordable. Again, the statute makes this possible because the conditions im-

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123. See, e.g., Jared Brey, *Diaz Stumps for Inclusionary Zoning to Expand*, PLAN PHILLY (Mar. 10, 2015), <http://planphilly.com/articles/2015/03/10/diaz-stumps-for-inclusionary-zoning-to-expand-affordable-housing> [https://perma.cc/6EUL-52TW] (“In some places, it’s mandatory: all new residential development requires units to be set aside for people making some percentage of the Area Median Income (AMI). In other places, it’s based on bonuses: developers can build beyond what the site’s zoning allows if they set aside a certain portion of units for lower-income residents.”).

124. See Dickinson, *supra* note 3, at 883.

125. See *id.*

126. *Id.*

127. See *id.*

posed on the municipality and private developer provide little choice but to engage with the community and consider community land trusts, among other things, as clear and convincing evidence of an affordable housing plan.

Community benefits agreements (CBAs) are another example of clear and convincing evidence that could be presented at condemnation proceedings to successfully bypass post-*Kelo* restrictions or obtain condemnation approval for blight removal. A municipality or authorized condemner who seeks to take blighted property could propose the creation of a CBA with the affected landowners and broader community to replace the lost housing and, more importantly, to satisfy the clear and convincing evidence standard of the proposed statute. The CBA would serve as the tool for how inclusionary eminent domain operates throughout the statutory requirements of the inclusionary takings process. The agreement would emphasize enforceability, accountability, transparency, and inclusiveness, and it becomes a legally-binding mechanism to help ensure that low-income families and community members have a direct voice in the decision-making process and planning of affordable housing in the new economic development project born from the inclusionary takings statute.<sup>128</sup> The CBA would likely be drafted with the support of “various community representatives” to leverage broad support and benefits for those affected by the condemnation, particularly low-income minority groups.<sup>129</sup>

The result of the agreement could be, for example, a fair share percentage of housing that would be constructed of up to fifty percent affordable housing. Further, the agreement could permit the developer to rely upon public subsidies. However, relying on organic land assembly processes to come to fruition in every economic development project is naïve. It simply does not happen in every major development project. In fact, many of the best-known examples are probably outliers in the land use and development process.

While most states have enacted “legislation [that] *enables* to some degree” community benefits agreements or community land trusts, none “*require* or *mandate*” stakeholders in economic development projects benefiting from condemned land to formulate an affordable housing plan as a condition to instituting the taking.<sup>130</sup> Therein lies the problem with relying solely on organic land assembly processes. They simply do not always result in equitable results without some legislative mandate.

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128. See *Mayor Bloomberg, Cornell President Skorton and Technion President Lavie Officially Transfer 12 Acres of Roosevelt Island to Cornell Tech*, NYC.gov (Dec. 19, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/420-13/mayor-bloomberg-cornell-president-skorton-technion-president-lavie-officially-transfer-12/#/0> [https://perma.cc/7NRA-VTCE].

129. See Dickinson, *supra* note 3, at 888.

130. See *id.*

Indeed, the basic idea of inclusionary takings is that if certain conditions are met—namely a showing of an affordable housing plan—then the local municipality and developer can bypass post-*Kelo* restrictions on economic development takings or condemn for blight removal purposes.<sup>131</sup> The proposed inclusionary takings statute is, in essence, a state-level constraint on the threat of exclusionary eminent domain. As Parlow notes, given the broad view of economic development takings expressed by the *Kelo* Court, “one might expect to see more examples of cities taking private property to meet the demand for affordable housing units.”<sup>132</sup> Yet, in the years shortly after *Kelo*, the legislative reform did not address takings that impact low-cost housing, and pro-affordable housing provisions have not been added to eminent domain statutes since then.

However, the proposed inclusionary statute does not make affordable housing the sole public purpose of the taking, but instead complimentary—or a condition—of the broader primary public purpose justification of economic development or blight removal. Both concepts of economic development and blight removal are vague, and state legislatures have maintained broad and general language to define those concepts under eminent domain statutes.<sup>133</sup> Most scholars are “reluctant” to identify economic development takings “as one of the functions of . . . gentrification.”<sup>134</sup> However, the inclusionary takings statute would apply to broad conceptions of blight removal and economic development takings in order to capture a variety of exclusionary effects of eminent domain, including those that condemn non-blighted property and those that condemn

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131. Ohio’s eminent domain statute is an example of conditioning eminent domain proceedings on the municipality meeting certain requirements. See OHIO REV. CODE ANN. § 163.021 (West 2016) (allowing eminent domain of blighted areas for public use if certain conditions are met). Ohio’s eminent domain code, specifically § B(1), is similar to the proposed statute in this Article. It places conditions on the taking of private property for slum clearance or blight removal purposes, such as the adoption of a comprehensive development plan. The statute reads:

(A) No agency shall appropriate real property except as necessary and for a public use. In any appropriation, the taking agency shall show by a preponderance of the evidence that the taking is necessary and for a public use.

(B) *Before an agency appropriates property based on a finding that the area is a blighted area or a slum, the agency shall do both of the following:*

(1) *Adopt a comprehensive development plan that describes the public need for the property. The plan shall include at least one study documenting the public need. All of the costs of developing the plan shall be publicly financed.*

(2) *If the agency is governed by a legislative body, obtain a resolution from that legislative body affirming the public need for the property.*

*Id.* §§ (A)–(B) (emphasis added).

132. Parlow, *supra* note 1, at 853.

133. See George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 59 (2008) (noting that “definitions of blight are [ ] broad and vague”).

134. See Carpenter & Ross, *supra* note 1, at 2451.



middle-class neighborhoods.<sup>135</sup> It may be easier to convince legislators, including those representing suburban localities, to pass an inclusionary takings statute that applies only to major metropolitan cities. However, this proposal is a state-wide initiative encompassing suburban and urban localities.

The application of inclusionary takings is naturally suited for “dense urban areas” to fight a variety of exclusionary problems, such as gentrification, segregation, and concentrated poverty.<sup>136</sup> Yet, the proposal is also useful for suburban localities. As David Dana has noted, exclusionary takings occur in both the suburban and urban contexts.<sup>137</sup> Indeed, poverty is no longer solely concentrated in the inner-cities. Suburbs are beginning to show the kinds of physical, social, and economic indicators of decline that many urban areas experienced in response to the urban exodus of the 1950s and 1960s.<sup>138</sup> Further, many older suburbs are worse off than their inner-city counterparts.<sup>139</sup>

In fact, inclusionary takings would be complementary to existing inclusionary zoning laws in localities that have enacted them. The increased commercial development and tax revenue from economic development takings—with the condition of affordable housing attached—would substitute the lack of tax revenue produced by housing development from inclu-

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135. Empirical research is necessary to determine whether economic development or blight removal condemnations cause increased gentrification. Nevertheless, an inclusionary takings statute would apply to broad conceptions of economic development and blight removal to mitigate direct displacement of poor families occupying blighted or non-blighted units within the area targeted for condemnation, alleviate the impact of high-priced development that would make voluntarily constructing low-cost housing unattractive to the new developer, and ease the threat of gentrification on surrounding areas adjacent or abutting the economic development area.

136. See Dickinson, *supra* note 3, at 869.

137. See Dana, *supra* note 2, at 8–9.

138. See MARK BALDASSARE, *TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION OF AMERICA* 192 (1986); WILLIAM H. HUDNUT III, *HALFWAY TO EVERYWHERE: A PORTRAIT OF AMERICA'S FIRST-TIER SUBURBS* viii (2003); PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* 92–114 (1997); W.H. LUCY & D.L. PHILLIPS, *CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL* 4–10 (2000); MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 28 (2002); Neil Smith et al., *The “Camden Syndrome” and the Menace of Suburban Decline: Residential Disinvestment and Its Discontents in Camden County, New Jersey*, 36 *URB. AFF. REV.* 497, 499 (2001); Thomas Bier, *Moving up, Filtering down: Metropolitan Housing Dynamics and Public Policy* 7 (Brookings Inst. Ctr. Urban and Metro. Policy, Discussion Paper, Sept. 2001).

139. See, e.g., ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973); DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820–2000* (2003); DAVID LISTOKIN & W. PATRICK BEATON, *REVITALIZING THE OLDER SUBURB* (1983); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); George Sternlieb & Robert W. Lake, *Aging Suburbs and Black Homeownership*, 422 *ANNALS AM. ACADEMY OF POL. & SOC. SCI.* 105 (1975).

sionary zoning.<sup>140</sup> Thus, as a practical matter, inclusionary takings legislation enacted by state legislatures offers a more robust and broad mechanism throughout a state because it would not be solely confined to dense urban areas, but would also apply to sprawling suburbs that struggle to provide avenues for affordable housing construction or that struggle to utilize vacant, abandoned, and blighted property. It is quite possible that localities that have enacted inclusionary zoning ordinances and are required to provide a fair share percentage of low-cost housing on a regional basis could supplement, or substitute, the need with housing created by inclusionary takings. In other words, a suburban municipality could amend inclusionary zoning ordinances to allow the municipality to meet some of its low-cost housing requirements through the units that are constructed from inclusionary takings.

The drawback, of course, is the specter of NIMBY-ism from suburban locals who may be concerned with integration by virtue of expropriation effects of inclusionary takings. Like inclusionary zoning, long-time residents of relatively homogenous locales might protest local municipal exercise of inclusionary takings as an integration and low-cost housing mechanism. To combat such protestations, it is quite possible that elected officials would justify inclusionary takings by noting that the primary focus of the exercise of eminent domain is to tap into the tax-generating benefits of economic development and the property-appreciating purpose of blight removal, with class and race integration viewed as merely secondary. One must remember that local elected officials want to keep their jobs, and thus, dressing up inclusionary takings as a benefit for both the middle class and the poor is essential.

William Fischel's "homevoter theory" provides hypothetical evidence that elected officials seeking to dress up integration as an economic benefit for taxpaying homeowners would benefit from an inclusionary taking, whereas inclusionary zoning does not necessarily provide the same tax and job creation incentives.<sup>141</sup> One could reasonably conclude that homevoters would support inclusionary takings in the suburbs because inclusionary takings achieve several desirables for suburban homevoters who would otherwise be skeptical of the law. For example, inclusionary takings identify vacant, blighted, or abandoned property, draw developers into the locality, take undesirable property that threatens to decrease homevoter property values throughout the suburban locality efficiently, generate tax revenue from commercial development, and allow for the creation of

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140. See, e.g., Phil Davies, *Condemned Prosperity*, FED. RESERVE BANK OF MINN. (Mar. 1, 2006), <https://www.minneapolisfed.org/publications/fedgazette/condemned-prosperity> [<https://perma.cc/Z3CX-PAFV>] ("A persuasive case can be made that eminent domain benefits communities by making it easier for local governments to revitalize underutilized or blighted land—thereby raising property values, creating jobs and generating more tax revenue.").

141. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 5–6 (2001) (discussing how local government decisions impact home values).

more jobs. A suburban locality and its homevoters receive all these benefits in exchange for a mere percentage of affordable housing within the economic development project.<sup>142</sup>

Alternatively, an inclusionary takings ordinance could be enacted by a local city council, separate from state legislative action. Concerns over the construction of exclusively market-rate residential units on economic development projects that exist as a result of blight removal or economic development takings originates from general welfare principles of state constitutional law—the *Mount Laurel* doctrine. Many advocates of inclusionary zoning raise this same concern when such ordinances are challenged in state court on regulatory taking or exaction grounds. In other words, a local inclusionary takings ordinance would target blight removal takings resulting in economic development of exclusively market-rate residential units that fail to offer *some* low-cost housing. The purpose behind this more locally-tailored inclusionary takings ordinance would be to alleviate exclusively market-rate developments that are deemed to contravene general welfare principles and under state constitutional law.

In light of the negative effect of socioeconomic segregation and the positive impact of integration policies on low-income communities, exclusively high-end residential development may be harmful to the health, safety and general welfare in the zoning context.<sup>143</sup> This principle of the general welfare as a basis for prohibiting exclusively market-rate housing is essentially the same as the public use requirement of promoting the public welfare in takings, so long as the taking is rationally related to a conceivable public purpose. Blight condemnations, for example, have satisfied public use doctrine because the eradication of blighted neighborhoods and properties falls comfortably within the police power to act in furtherance of the health, safety, and general welfare of the residents.<sup>144</sup> As Audrey McFarlane has noted, *Mount Laurel* obligations of integration and low-cost housing should be useful when municipalities condemn “in connection with redevelopment.”<sup>145</sup>

Similar to the *Mount Laurel* doctrine’s implication of “developing” municipalities’ zoning ordinances, a local government could conceivably enact an inclusionary takings ordinance implicating any economic development projects deriving from blight removal or economic development takings to provide some below-market housing. Of course, making this maneuver at the local level has a caveat. *Mount Laurel* is a rare doctrine

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142. See generally *id.*

143. See *Cal. Building Indus. Ass’n v. City of San Jose*, 351 P.3d 974 (2015).

144. See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

145. See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 59–60 (2006).

that imposes state-level constraints on land use and housing production and few states, if any, have followed suit to the same degree.<sup>146</sup>

But if courts in the *Mount Laurel* context struck down exclusively or disproportionately single-family residential zoning ordinances as violations of basic general welfare principles of state constitutional law, then perhaps local municipalities in the post-*Kelo* era are likewise equipped to restrict exclusionary residential development—the same vein as inclusionary zoning—that derive from blight removal or economic development takings by mandating a certain percentage of low-cost housing built directly on the economic development site. Indeed, in the inclusionary zoning context, this is a familiar principle. Restrictions on the types of property that may be constructed, such as commercial, residential, multifamily, or single family, etc., are permissible so long as they bear a reasonable relationship to the public welfare. State constitutional general welfare principles could and should be primary considerations in drafting an ordinance requiring low-cost housing on economic development projects that exist as a result of blight removal or economic development takings. This would be a local ordinance-like deviation from exclusionary eminent domain doctrine’s state court power to directly restrict or deny municipal condemnations where affordable housing shortages may result from a taking. Of course, city councils do not have that same judicial power, but they could conceivably regulate the resulting use of the development projects derived from the taking.

However, as noted above, this Article focuses on a state legislatively-led initiative, as opposed to a local municipal ordinance, as an arguably stronger mechanism to trigger affordable housing and simultaneously overcome post-*Kelo* restrictions on blight removal and economic development takings attempted to skirt low-cost housing obligations.

But does inclusionary takings legislation withstand constitutional scrutiny like inclusionary zoning? Does conditioning economic development or blight removal takings on a commitment to affordable housing satisfy a public use, and if so, does the law trigger other Fifth Amendment violations, such as exactions or regulatory takings?

#### IV. THE CONSTITUTIONALITY OF INCLUSIONARY TAKINGS

The state action of what this Article refers to as “inclusionary takings” is novel. The proposed “inclusionary takings legislation” is also novel in that it is an unexplored facet of the interplay between state legislation and the Takings Clause. The Supreme Court has not addressed whether regulatory takings or exaction challenges apply to state legislation regulating eminent domain, and there are important questions regarding its suitability.

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146. See *Mount Laurel II*, 456 A.2d 390, 490 (N.J. 1983) (requiring municipalities to “provide[] a realistic opportunity for [] construction” of affordable housing).

ity as a justified public use that should be considered when thinking about the practical application of inclusionary takings.

#### A. *The Public Use of Inclusionary Takings*

An important question regarding the constitutionality of inclusionary takings is whether such takings are in furtherance of, and tailored to, a public use that is the province of the legislature.<sup>147</sup> The proposed statute would seem to satisfy a public use because courts, by virtue of *Kelo*, already give deference to such legislative determinations,<sup>148</sup> and will not substitute their judgment for that of the state legislature “unless the use be palpably without reasonable foundation.”<sup>149</sup> In the context of housing, state courts upheld eminent domain statutes that authorized condemning agencies—such as public housing authorities or urban development authorities—with takings power. Provided that the purpose of the taking was to ameliorate visibly distressed slums through urban renewal, courts upheld such takings even if the primary underlying wedge was the construction of public housing. This same interpretation applies today.

Even in the post-*Kelo* era, state legislatures have kept blight removal exceptions intact.<sup>150</sup> Thus, large cities will likely redevelop depressed areas, and where redevelopment projects involve state or federal funding, low-cost housing or relocation assistance is often required in the development area. However, a lack of federal funding for economic development projects has created somewhat of a vacuum, where many major economic development projects are driven by the private developer and available equity; thus, the absence of federal funding relieves the developer of any affordable housing or relocation obligations.<sup>151</sup> In the event there is political will to pass such a law, inclusionary takings legislation may fill the void where courts have yet to apply “heightened review” when condemnation razes existing low-cost housing.<sup>152</sup>

As noted in Part III, the inclusionary takings provision of an eminent domain statute also does not permit takings solely for the purpose of constructing affordable housing.<sup>153</sup> Low cost housing is complementary to the broader goal of economic development. The construction of affordable housing units by the developer is the wedge that satisfies the public use justification of economic development. Like public housing construction as part of a larger slum clearance and urban renewal projects in the 1930s, affordable housing construction, as part of a larger economic develop-

147. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–40 (1984); *Berman v. Parker*, 348 U.S. at 31–33.

148. See *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925).

149. See *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896).

150. See Parlow, *supra* note 1, at 860.

151. See *id.* at 860–61.

152. See Dana, *supra* note 2, at 23, 27.

153. See *supra* notes 69–75 and accompanying text.

ment project or blight removal agenda, would likely satisfy the public use requirement.<sup>154</sup>

Mandating a housing plan also seems reasonably justified as a legitimate exercise of the state legislature's power to protect affected landowners from eminent domain abuse while, at the same time, asserting the police power for the health, safety, and welfare of the community to mitigate exclusionary eminent domain. Thus, it would stand to reason that an inclusionary taking is constitutionally justified under the Fifth Amendment Takings Clause as for the eminent domain takings vein of constitutional property analyses because the statute is not forcing the municipality and private developer to construct affordable housing outright, but instead is conditioning its power to use eminent domain on such a requirement and trigger housing as an accessory or complimentary component of the economic development project.

But while a court may accept the stated justification of a condition of affordable housing as complementary to the broader economic development project because it satisfies a public purpose, it is possible that a court would question the municipality's right—authorized by the inclusionary takings statute—to advertise that, for a low cost housing concession, “it would condemn land at the request of ‘private developers.’”<sup>155</sup> Nicole Garnett argues that cases where courts require that the government demonstrate a connection between the challenged taking and the public purpose used to justify it are more akin to a *Nollan* and *Dolan* heightened review analysis because the courts are requiring the local municipality to establish a “means-ends connection similar to that demanded by *Nollan* and *Dolan*.”<sup>156</sup> Indeed, it is quite possible that a court, faced with a chal-

154. See, e.g., *Brammer v. Hous. Auth. of Birmingham*, 239 Ala. 280 (1940) (upholding statute authorizing public housing authority with power to condemn and acquire private property to construct low-cost housing project.); *Humphrey v. City of Phoenix*, 55 Ariz. 374 (1940) (upholding statute authorizing city exercise of right of eminent domain to acquire sites for construction of low-cost housing projects); *Hous. Auth. of L.A. Cty. v. Dockweiler*, 94 P.2d 794 (Cal. 1939) (upholding statute authorizing public housing authority power to condemn unsafe and insanitary conditions by constructing low-rent housing projects and slum clearance and public housing projects for low-income families are public uses); *Marvin v. Hous. Auth. of Jacksonville*, 133 Fla. 590 (1938) (upholding statute authorizing redevelopment authority power to condemn private property to clear slums and construct low-cost housing projects and finding such authority satisfies public purpose); *Williamson v. Hous. Auth. of Augusta*, 186 Ga. 673 (1938) (upholding statute conferring right of eminent domain upon housing authority as within power of legislature and stating construction of low-cost housing is for public purpose which affects general public); *Krause v. Peoria Hous. Auth.*, 370 Ill. 356 (1939) (upholding statute authorizing housing authority power to acquire private property and engage in low-rent housing and slum clearance projects).

155. See *Sw. Ill. Dev. Auth. v. Nat'l City Envtl.*, 768 N.E.2d 1, 10 (Ill. 2002) (finding that means by which development authority sought to advance public use goals by advertising condemnation at request of private developer exceeded state and federal constitutional limits on eminent domain power).

156. See Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 937 (2003).

lunge to the inclusionary takings statute, “abandons rational-basis review and require[s] the government” to show evidence of a connection between “the means by which it acquires land” to the public purpose of low-cost housing construction for acquisition.<sup>157</sup> However, as Garnett acknowledges, courts have not yet made this doctrinal move.<sup>158</sup> This raises a second set of questions regarding the validity of an inclusionary takings statute in the context of regulatory takings and exactions.

#### B. *Inclusionary Takings as Regulatory Takings and Exactions*

Regulatory takings usually involve “a specific parcel of real property” with incentives built into its use through local regulations.<sup>159</sup> In the housing context, some courts have found inclusionary zoning laws requiring a certain percentage of units to be set aside for low-cost housing to amount to a land use regulation instead of a regulatory taking or an exaction.<sup>160</sup> Thus, challenges to these laws under the regulatory takings vein usually do not succeed.<sup>161</sup> Indeed, state courts have determined “no doubt that creating affordable housing for low and moderate income families is a legitimate state interest,” passing the substantial advancement test and that inclusionary methods under zoning ordinances “increase the supply of affordable housing” by requiring developers to provide the housing at an affordable rate.<sup>162</sup> Inclusionary takings pose intriguing and complex questions about the regulatory nature of imposing housing conditions on developers under state eminent domain statutes as opposed to local zoning codes.

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157. *See id.* at 938.

158. *See id.*

159. *See* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597, 2599 (2013). Further, “[w]here the permit is denied and the condition is never imposed, nothing has been taken.” *Id.* at 2597. The *Koontz* decision entitled landowners to challenge permit denials based on the *Nollan* and *Dolan* standards:

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

*Id.* at 2596.

160. *See, e.g.,* *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974, 991 (Cal. 2015).

161. *See* *Holmdel Builders Ass’n v. Township of Holmdel*, 583 A.2d 277, 294 (N.J. 1990) (upholding mandatory in lieu fees as alternative to mandatory set-aside of affordable units); *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983) (upholding mandatory set-aside against regulatory taking claim).

162. *See* *Home Builders Ass’n of N. Cal. v. City of Napa*, 90 Cal. App. 4th 188, 195–96 (2001).

1. *Nollan and Dolan Exactions*

Inclusionary takings may be shielded from the doctrinal vulnerability of *Nollan* and *Dolan* exactions that threaten inclusionary zoning. In *Dolan*, the Court ruled that an “essential nexus” must exist between conditions exacted by a municipality and the advancement of “legitimate state interest[s].”<sup>163</sup> Further, it ruled that exactions required by a municipality must demonstrate “rough proportionality” to the impact of the proposed development.<sup>164</sup> Where a municipality’s condition attempts to impose a permanent easement, for example, on a landowner’s property without sufficiently showing that the easement was necessary to advance a legitimate state interest, the condition will be deemed an exaction in violation of the Fifth Amendment.<sup>165</sup> Likewise, in *Nollan*, the Court required an essential nexus to exist between the “legitimate state interest” and the condition exacted by the state.<sup>166</sup> Thus, *Nollan* and *Dolan* established a heightened standard for reviewing land use exactions and “special application of the doctrine of unconstitutional conditions.”<sup>167</sup> The burden of proof, therefore, fell on the state to show that the standards are satisfied.<sup>168</sup>

In the inclusionary zoning context, developers have challenged ordinances on the grounds that they are exactions, and that courts should apply rigorous heightened review established by *Nollan* and *Dolan*. The question for courts faced with such challenges is whether the ordinances are designed to permit state agencies to apply “individualized ad hoc” building permit determinations based on whether the developer concedes to the affordable housing requirement.<sup>169</sup> But because most inclusionary zoning ordinances are adopted by local governments statutorily, it is unclear whether inclusionary zoning falls within the ambit of a typical exaction because a legislative act imposes the condition broadly throughout the locality for all new residential development, instead of imposing the condition on an ad hoc basis by a planning commission. The California Supreme Court recently found that a residential inclusionary zoning ordinance was nothing more than a “land use regulation” subject to the police power standard of review, instead of heightened review under *Nollan* and *Dolan*, because the ordinance’s purpose was to promote public goods

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163. See *Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994) (citing *Nollan v. Calif. Coastal Comm’n*, 483 U.S. 825, 837 (1987)).

164. See *id.* at 391.

165. See *id.* at 394–95.

166. See *Nollan*, 483 U.S. at 841.

167. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (internal quotation marks omitted).

168. See *Dolan*, 512 U.S. at 391 n.8.

169. See *Inclusionary Zoning: Legal Issues*, CALIF. AFFORDABLE HOUSING PROJECT & WESTERN CTR. ON L. & POVERTY (Dec. 2002), [http://www.pilpca.org/wp-content/uploads/2010/10/IZLEGAL\\_12.02.pdf](http://www.pilpca.org/wp-content/uploads/2010/10/IZLEGAL_12.02.pdf) [<https://perma.cc/VPQ3-MXLX>] (discussing takings challenges with respect to *Nollan* and *Dolan*).



broadly, such as low cost housing, and disperse such housing throughout the locality.<sup>170</sup> However, the Court acknowledged that if an ordinance is designed as a legislatively imposed mitigation fee, then it is possible that the ordinance would require an exaction standard of review because the fees would could be interpreted as a mechanism to mitigate the harm caused by a particular new development.<sup>171</sup> Inclusionary zoning ordinances that frame the in-lieu fee requirement as an impact fee may also run the risk of being invalidated as an exaction.<sup>172</sup>

It is not clear that *Nollan* and *Dolan* apply to eminent domain in the inclusionary takings context because the landowner who is divested of the property interest is paid just compensation by the government. However, hypothetically, if courts apply an exaction-like analysis, municipalities and private developers would need to satisfy the essential nexus and rough proportionality tests. To do this, the municipality would have to craft a housing plan in collaboration with the private developer to actually satisfy and be roughly proportional and related to the goal of integrating the economic development project with low-income families and producing affordable units. In conducting this analysis, it appears that an essential nexus would exist between the housing condition being imposed and the government's goal of ameliorating the social and economic liability of a particular area, especially as the condition seeks to benefit the health, safety, and general welfare of low-income residents within the municipality.<sup>173</sup> In the proposed inclusionary takings statute, the condition requiring the submission of evidence of a housing plan essentially compels the municipality and developer to craft a housing plan that satisfies the tests. This condition is similar to the specifications required when landowners or developers seeking a building permit submit development applications agreeing to a certain percentage of low cost housing in exchange for approval in the inclusionary zoning context.

One salient point that deserves further exploration is the fine distinction between the role of a state legislature and the role of local municipalities' administrative agencies in the exaction context. In the land use approval and permitting process, state administrative agencies, such as planning commissions, are the primary institutional players that either approve or deny a developer's building permit. These agencies make "individualized determination[s]" as to whether the condition imposed in exchange for a building permit "is related both in nature and extent to the proposed development's impact."<sup>174</sup> To obtain the building permit,

170. See generally *Cal. Building Indus. Ass'n v. City of San Jose*, 351 P.3d 974 (Cal. 2015).

171. See *id.* at 504.

172. See *Holmdel Builders Ass'n v. Twp. of Holmdel*, 583 A.2d 277, 287 (N.J. 1990).

173. See *Nollan*, 483 U.S. at 835 (stating "broad range of governmental purposes" can constitute legitimate state interests).

174. See *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994).

the developer must satisfy requirements under the municipalities' land use and zoning apparatus, such as height restrictions, building type, and use requirements and sometimes must satisfy conditions that exact certain contributions to mitigate the impact of proposed economic development projects. However, in the inclusionary takings context, the state legislature is arguably not regulating the use of the land directly, but rather indirectly. In other words, it is the state legislature, instead of the local municipality, that is regulating the acquisition, rather than the use, of the land.<sup>175</sup>

The process of actually acquiring the land is subject to the condition. The requirement to submit a housing plan is inserted into the statute as a *condition* to initiate eminent domain proceedings, not to assign the property to a particular use. These conditions must be met in order for the municipality to be able to initiate eminent domain proceedings. While the submission of a housing plan in court as part of the eminent domain proceedings is similar to the submission of a building permit to a zoning officer or development application to a planning commission, the optics are different. There are key differences between state legislation that regulates eminent domain to trigger affordable housing construction and the adjudicative procedures that administrative agencies employ to exact low-cost housing contributions from developers.

Unlike inclusionary zoning, which is *enabled* by state legislatures through its zoning powers but *enacted* by local municipalities, inclusionary takings conditions are nestled within a statute enacted by the state legislature. The state legislature, in other words, is not an administrative agency tasked with the power to make individualized determinations of land use permits, zoning appeals, variance requests, and special exceptions and cannot assess impact mitigation. In those land use situations, the state, through its local administrative agencies, is concerned with the use to which the property will be put, whether it conforms to existing uses, whether the project affects a non-existing use, and its potential impact on land use regulations. This is a crucial distinction that effectively removes an inclusionary takings condition from the scope of the land use process and shields the condition from being categorized as a land use regulation, thereby potentially protecting an inclusionary takings statute from exaction challenges.

The Supreme Court has not decided whether legislatively-enacted conditions are subject to an exactions test, and state courts are at odds on whether to apply the standard to state legislation that imposes an exaction on a developer or landowner. While *Dolan* did not address the distinction between adjudicative and legislative exactions, it did, however, note that "land use regulations . . . differ in two relevant particulars" from the typical

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175. For an example of such authority being exercised by the state legislature as demonstrated in a proposed inclusionary takings statute, see *supra* note 120 and accompanying text.

landowner seeking a building permit.<sup>176</sup> Legislative determinations may “classify[ ] entire areas of the city.”<sup>177</sup> For example, zoning codes divide and separate various uses into districts throughout a municipality, whereas local administrative agencies “ma[de] adjudicative decision[s] to condition [a landowner’s] application for a building permit on an individual parcel.”<sup>178</sup> This is an important point that divides states and has not been addressed by the Supreme Court.<sup>179</sup> Even Justice Thomas, in a dissent denying certiorari in *Parking Association of Georgia, Inc. v. City of Atlanta*,<sup>180</sup> noted that “[t]he lower courts are in conflict over whether *Dolan*’s test for property regulation should be applied in cases where the alleged taking occurs through an [a]ct of the legislature.”<sup>181</sup> Justice Thomas went fur-

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176. See *Dolan* 512 U.S. at 385.

177. See *id.*

178. See *id.*

179. See *Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (holding that “[b]ecause the Scottsdale case involves a generally applicable legislative decision by the city, the court of appeals thought *Dolan* did not apply”). The Arizona Supreme Court agreed with this point, but noted that “the question has not been settled by the Supreme Court.” See *id.* (citing *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995)); see also *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001) (holding that *Nollan* and *Dolan* heightened review does not apply to legislation effecting impact fee exaction). But see *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989, 1027 (D.S.D. 2002) (holding that legislative nature of exaction “does not mean that a regulatory takings analysis is the wrong framework for this case”); *Ehrlich v. City of Culver City*, 911 P.2d 429, 447 (Cal. 1996) (“[I]t is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a generally applicable development fee or assessment—cases in which the courts have deferred to legislative and political processes to formulate ‘public program[s] adjusting the benefits and burdens of economic life to promote the common good.’” (alteration in original) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978))); *Amoco Oil Co. v. Vill. of Schaumburg*, 661 N.E.2d 380, 386–92 (Ill. App. Ct. 1995) (applying *Nollan/Dolan* analysis to legislative land-dedication requirement); *J.C. Reeves Corp. v. Clackamas Cty.*, 887 P.2d 360, 365 (Or. Ct. App. 1994) (citing *Dolan*, 512 U.S. at 383) (applying both *Nollan* and *Dolan* tests to legislation that imposes exactions and noting that “[t]he nature, not the source, of the imposition is what matters”); *Schultz v. City of Grants Pass*, 884 P.2d 569, 572–73 (Or. Ct. App. 1994) (quoting *Dolan*, 512 U.S. at 385) (stating that “the character of the restriction remains the type that is subject to the analysis in *Dolan*”). The *Schultz* court then relied upon *Dolan* as drawing a “distinction between the legislative land use decisions that are entitled to a presumption of validity and the exactions that are not.” *Id.* at 573. Relying on the Supreme Court, the court in *Schultz* “noted that what triggers the heightened scrutiny of exactions is the fact that they are ‘not simply a limitation on the use’ to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government.” *Id.* (quoting *Dolan*, 512 U.S. at 385); see also *Sparks v. Douglas Cty.*, 904 P.2d 738, 746 (Wash. 1995) (holding road dedication requirement reviewable under *Dolan*).

180. 450 S.E.2d 200 (Ga. 1994).

181. See *Parking Assoc. of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (Thomas & O’Connor, JJ., dissenting). Justices Thomas and O’Connor would have heard the case on appeal. See *id.* at 1116–18 (Thomas & O’Connor, JJ., dissenting). Justice Thomas further elaborated, stating:

ther, stating that “[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking.”<sup>182</sup> He analogized “a city council [that] can take property just as well as a planning commission can” and that “the general applicability of the ordinance should not be relevant in a takings analysis.”<sup>183</sup> Thomas argued, “[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.”<sup>184</sup> Thus, whether an inclusionary takings statute would be struck down as an exaction is unclear, but it seems unlikely because the proposed statutory condition falls outside the land use approval process and therefore is arguably not a land use regulation or governmental exaction subject to *Nollan* and *Dolan*. This shields inclusionary takings from most of the doctrinal vulnerability that threatens inclusionary zoning. However, as noted above, if courts were to make the doctrinal move of invoking *Nollan* and *Dolan*’s heightened review of condemnations as part of the public use test, then inclusionary takings could conceivably be struck down. Courts could potentially view such inclusionary condemnations as no more than an advertisement to land shop directed at developers, who then request the municipality condemn the land in exchange for a commitment to some affordable housing construction on the condemned land.

Lastly, the inclusionary takings statute encourages a “three-way engagement . . . among the [affected landowners], private developer and municipality.”<sup>185</sup> As discussed above, CBA’s are one of many land assembly tools that could be utilized to plan and prepare the affordable housing plan required for submission at condemnation proceedings to overcome the clear and convincing evidence standard. The CBA could be submitted as evidence of such a plan and would likely trigger many of the elements of inclusionary eminent domain, such as collaboration with the affected landowners, collaboration, and negotiation. However, the invocation of the agreement in the inclusionary takings context raises exaction questions, particularly if the agreement runs afoul of the local land use processes and other issues involving contract zoning and subdivision exactions. When analyzed separately, particularly the “good faith negotiations”

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It is hardly surprising that some courts have applied *Dolan*’s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis . . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

*Id.* at 1117–18.

182. *Id.*

183. *Id.* at 1118.

184. *Id.*

185. See Dickinson, *supra* note 3, at 883.

and the “affordable housing” condition set forth in section (b) of the proposed statute, the concern over exactions and unconstitutional conditions become clearer.

Vicki Been has raised concerns over the validity of community benefit agreements that impede local land use approvals processes and whether such agreements withstand legal challenges.<sup>186</sup> This concern is partly due to the fact that administrative agencies, planning commissions, and zoning boards are already subordinate to a state’s regulatory apparatus. It is questionable then whether an agreement that sets forth a promise by the developer that twenty percent of the residential units constructed on the economic development site will be below-market at fifty percent of the area median income has an essential nexus or rough proportionality to the impacts of the development. If the agreement between the municipality, developer, and affected community allows for the developer to skirt his housing obligation, then the agreement may run afoul of the inclusionary takings statute, raising a slew of local-state conflict between regulations and contract law. The problem here is that there is a dearth of literature or case law on the legality of the state entering into an agreement that exacts affordable housing contributions from private developers.

However, a cursory review of exactions as related to community benefits agreements does not necessarily raise the specter of *Nollan* and *Dolan* challenges striking down the proposed law. First, affected landowners and the municipality do not voluntarily need to convince—or coerce—a developer to enter into a CBA. The inclusionary takings statute, imposed by the state legislature, already requires the developer to engage with the municipality in some manner to adopt a housing plan in order to benefit from the taking. Second, a CBA would be confined to the goals set forth under the inclusionary takings statute, such as collaborating to design a housing plan for submission at the condemnation proceedings. Lastly, as mentioned above, because the CBA would be entered into prior to the developer or municipality having any property interest in the condemned land, the benefits that flow from the agreement would probably not take effect until the condemnation proceedings have concluded and the land has been conveyed to the developer. At that point, the developer has already agreed to the benefits and has fulfilled his or her statutory obligation. Further, the extent of the community benefits agreement raises questions that are unanswerable here. If the CBA focused strictly on the details of the affordable housing plan, such as “a certain percentage of affordable units to be constructed,”<sup>187</sup> the affordability rate of each unit, and the number of layered subsidized housing within the development, such as Section 8 or low-income housing tax credits, then it is unlikely that the

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186. See Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010).

187. See Dickinson, *supra* note 3, at 886.

agreement would not pose as an exaction threat for the property interest reasons stated above.

## 2. *Koontz's Monetary Exaction and Permit Denial*

*Koontz*, likewise, may pose as an obstacle for inclusionary takings because the Court, rather illogically, found that permit denials constitute takings under *Nollan* and *Dolan* when the landowner rejects the government's demand that the landowner agreed to an exaction.<sup>188</sup> Unlike certain conditions for below-market units frequently found in inclusionary zoning laws—which are subject to regulatory takings and exaction claims—inclusionary takings mandate only an affordable housing plan as a condition to be met to effect an eminent domain taking successfully. While the requirement of a housing plan would cause the developer and the municipality to expend some money and resources, the condition is not an outright monetary demand per *Koontz*. Further, even if some expenditure of money and resources resulted in preparation of the housing plan, this expenditure is not that different from money and resources used to prepare building permit applications, development rights applications, or zoning variance applications in the land use approval process. The developer is going to have to traverse those land use permitting and building processes anyways.

Hypothetically, if a court denied the municipality its eminent domain powers because it did not meet the clear and convincing standard of an affordable housing plan, per the provisions set forth in the proposed inclusionary takings statute, it is possible the law would trigger a *Koontz* exaction because some condition is being imposed. For example, if the private developer rejects the municipality's demand to prepare an agreement on affordable housing or fails to successfully negotiate the agreement that the developer accede to an exaction in the form of an affordable housing plan, then under *Koontz* it is possible that a court could find a taking for the developer. Likewise, denying the municipality the power to exercise eminent domain as a result of the developer's rejection of the affordable housing condition may also trigger an unconstitutional exaction. The problem with these scenarios, however, is that the link between an identifi-

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188. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013). The landowner filed an application for permits to dig and construct wetlands for commercial development. See *id.* at 2592. The management district, however, required that the landowner “offset the resulting environmental damage” in order to obtain permission. See *id.* The landowner proposed “a conservation easement on [the] portion of his property” that he did not plan to develop. See *id.* at 2593. The management district was not satisfied and proposed several alternatives. See *id.* The landowner refused to comply with the alternative options for offsetting the environmental impact. See *id.* As a result, the management district denied the landowner's application, stating that without satisfactory mitigation, the landowner failed to meet the standards necessary for approval. See *id.* The landowner filed suit, arguing that the permit denial failed the “essential nexus” and “rough proportionality” tests. See *id.*

able property interest and an exaction in the inclusionary takings context is tenuous.

Neither the municipality nor the private developer has any identifiable property interest when the inclusionary takings provision is triggered at the time condemnation proceedings commence. The only property interest is that of the affected landowner whose property is threatened by the prospect of the taking, but who presumably has been justly compensated. Thus, it is difficult to see how a court would find an unconstitutional exaction under *Koontz* because the developer and the municipality do not have a property interest in the condemned land. On the contrary, in *Koontz*, *Nollan*, and *Dolan*, the landowners already had a fee simple interest in the affected land. In those cases, the landowners were simply seeking approval to develop certain portions of the land pursuant to local land use approval processes. Lastly, unlike inclusionary zoning, with respect to inclusionary takings, the state is essentially expending some of its own resources to meet its fair share affordable housing. How? In order to trigger affordable housing construction, the municipality must (1) prepare a housing plan prior to condemnation in collaboration with the private developer and (2) pay just compensation to the landowner whose land it is seeking to condemn.

### 3. Loretto's *Permanent Physical Occupation*

An inclusionary takings statute may trigger a permanent physical occupation.<sup>189</sup> It is well-established that “a permanent physical occupation [of property] authorized by government is a taking without regard to the public interests that it may serve.”<sup>190</sup> Indeed, requiring a landowner to grant, for example, “an easement outright” presents a physical occupation and most likely a taking.<sup>191</sup> Some courts have also found that requiring a landowner to grant a public easement in order to obtain rezoning of property “involve[d] a physical taking rather than a regulatory one.”<sup>192</sup> Still, it is unlikely that the proposed statute gives rise to a permanent physical taking. As discussed above, the timing of ownership is key.

While the statutory conditions under inclusionary takings may arguably provide for the permanent physical occupation by way of the requirement to set aside portions of the condemned land for affordable housing for the public benefit, the conditions do not apply to any property interest or right of the local municipality or private developer at the time the applicants seek approval to condemn. In other words, the forfeiture of a

189. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that statute allowing cable company to place permanent cable facilities on landowner's property is taking because it constitutes “a permanent physical occupation of property”).

190. See *id.* at 426.

191. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); see also *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

192. See *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

property interest before the local municipality and private developer even acquire an interest in the property does not establish a taking of a permanent physical nature.

Essentially, the property interest must be recognizable under the law to have a compensable takings claim. The municipality, instead, is being compelled by the state legislature to come before the courts to request the right to exercise eminent domain and acquire the property in condemnation proceedings. Thus, compelling the municipality to engage with a private developer to strike an agreement to show clear and convincing evidence of an affordable housing plan as a condition that must be met before the exercise of eminent domain is unlikely a permanent physical occupation.

#### 4. Lucas's *Total Taking*

Unlike the landowners in *Lucas v. South Carolina Coastal Council*,<sup>193</sup> a developer subject to an inclusionary taking statute is unlikely to be subject to a total taking.<sup>194</sup> Inclusionary takings do not bar, restrict, or limit a private developer from constructing certain structures on the condemned land, but merely regulate his or her ability to benefit from takings for economic development or blight removal. The proposed statute accomplishes this task by requiring the developer and municipality to meet requirements of affordable housing construction. Indeed, the affordable housing condition does not deprive the private developer of all “economically viable use” of the condemned land once it is conveyed from the taking because the developer does not hold any property interest in the land at the time condemnation proceedings begin; rather, the statute merely regulates the municipalities’ power to institute condemnation proceedings and does not deprive the developer of “economically viable use” of the land.<sup>195</sup>

The private developer can still engage in significant development on the economic development site that makes the use of the property economically viable once a municipality obtains approval to condemn the land. Once a property interest is recognizable, the developer has carte blanche to develop and profit, subject to land use approvals and subject to an obligation to build affordable housing pursuant to the agreement with the municipality.

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193. 505 U.S. 1003 (1992).

194. *See id.* at 1019, 1063 (holding that barring landowner from constructing habitable structures on land after landowner purchased it can constitute taking because it “denies [the landowner] economically viable use of [ ] land” (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))).

195. *See id.* (discussing consequences of requirements that do not permit landowner to enjoy “economically viable use of [ ] land”).



5. Penn Central's *Ad Hoc Test*

Even *Penn Central's* ad hoc test does not seem to pose significant hurdles to inclusionary takings.<sup>196</sup> The affordable housing conditions are arguably exacted before the local municipality receives approval to condemn and proceeds to take, acquire, and transfer the property interest to the private developer. The burden of affordable housing price restrictions, if any, is not triggered until after the private developer has acquired the condemned property and construction begins and is completed. Further, prior to acquiring the land, the private developer has presumably already agreed—by way of a community benefits agreement or commitment to creating a community land trust—to provide affordable housing. Thus, the *Penn Central* test is unlikely to apply or be of consequence because the private developer's "investment-backed expectations" are not troubled enough to rise to a regulatory taking prior to or after condemnation proceedings commence.<sup>197</sup>

## V. CONCLUSION

It is important to acknowledge that the statutory proposal has never been empirically tested or modeled in accordance with housing market areas of suburban or urban localities. Nonetheless, the framework proposed could be considered as a starting point for many state legislatures seeking new and innovative avenues to provide affordable housing for low-income families in dense urban areas (particularly in light of the new urbanism movement), push back against the specter of gentrification, and ameliorate the phenomenon of exclusionary eminent domain.

It is important to note that if a state legislature enacted the proposed statute it would not necessarily treat all housing shortages adequately or integrate urban or suburban neighborhoods completely. The proposal does, however, serve as an example of one of many potential resolutions to affordable housing shortages and how state legislatures can utilize the Fifth Amendment takings powers to advance police power authority to serve the health, safety, and general welfare of poorer residents threatened by the prospect of exclusionary eminent domain.

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196. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136–38 (1978) (holding that designating landowners' train station historical landmark is not taking because it "does not interfere in any way with the [land's] present uses" or prevent landowner from "obtain[ing] a 'reasonable return' on its investment").

197. For a discussion of investment-backed expectations, see Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3 (1987).